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No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

BRIEF OF WASHINGTON PUBLIC UTILITIES GROUP IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of the State of Washington unconstitutionally manipulate Washington state law to deprive investors in tax-exempt municipal bonds of their property or due process rights where it twice reviewed the municipal authority and equitable relief questions at issue in a comprehensive, reasoned, and unbiased manner?

2. Did the respondent Washington public utility districts and cities unconstitutionally deprive investors in tax-exempt municipal bonds of their property rights by complying with the decision of the Supreme Court of the State of Washington that they did not have legal authority to enter into an agreement to purchase energy capability, and where, prior to that decision, Respondents took all reasonable steps to plan and provide for investor repayment pending judicial resolution?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set forth at pages iii-v of the Petition for Certiorari correctly identify the parties to this litigation. This Brief in Opposition to Petition for Certiorari is submitted by certain respondent Washington public utility districts and one Washington city, collectively referred to as the Washington Public Utilities Group. The Washington Public Utilities Group is comprised of the following: Public Utility District No. 1 of Benton County, Washington; Public Utility District No. 1 of Clark County, Washington; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Lewis County, Washington; Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 3 of Mason County, Washington; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 2 of Pacific County, Washington; Public Utility District No. 1 of Skamania County, Washington; and, the City of Tacoma, Washington. The Washington Public Utilities Group represents shares of Washington Public Power Supply System Nuclear Projects 4 and 5 ("WNP 4 and 5") comprising approximately 45%.

This Brief in Opposition to Petition for Certiorari will address only those alleged constitutional issues purportedly arising from the decision of the Supreme Court of Washington which relate to municipal authority and equitable relief against Washington municipalities. Issues unique to Respondents who are not Washington public utility districts or cities will not be examined in this Brief.

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BRIEF OF WASHINGTON PUBLIC UTILITIES GROUP IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, the Washington Public Utilities Group, respectfully pray that this Court deny the Petition for Certiorari submitted by Chemical Bank and the Washington Public Power Supply System.

OPINIONS BELOW

The recitation of the proceedings below at pages 1-2 of the Petition for Certiorari in general is an accurate summary.

JURISDICTION

These Respondents respectfully disagree with Petitioners that this Court has jurisdiction to review the judgment of the Supreme Court of Washington at issue.

Review on writ of certiorari to this Court of an opinion of a state court of highest jurisdiction interpreting state law may be granted only if there is a substantial federal question. United States Supreme Court Rule 17.1. Contrary to Petitioners' assertions, and despite the dollar amounts involved, there is no substantial federal question arising from this lawsuit.

Petitioners attempt to constitutionalize purely non-constitutional state law issues, just as they have repeatedly attempted in the state court litigation. Furthermore, many of the issues Petitioners attempt to raise here were squarely raised and rejected by this Court in denying these same Petitioners' Petition for Certiorari in *Chemical Bank and Washington Public Power Supply System v. Asson*, No. 83-1619 (October Term, 1983).

Moreover, even a cursory examination of the Petition for Certiorari quickly reveals that Petitioners' real case is a series of alleged misrepresentations by Respondents. Over and over, throughout the Petition, the focus is upon Respondents' "promises", "assurances", "persuasion", and the like. Petitioners are, in essence, attempting to litigate Chemical Bank's federal district court securities lawsuit before this Court by means of an unfounded characterization of the outcome of state law litigation as rising to federal constitutional proportions simply because the result was unfavorable to them. Petitioners also claim that they and the bond purchasers they represent are totally without other avenues of possible relief. Nothing could be further from the truth.

Petitioners only briefly allude to the massive lawsuits brought by Chemical Bank and WNP 4 and 5 bond purchasers (a class action), which are now being vigorously litigated in the United States District Court for the Western District of Wash-

ington. *Chemical Bank v. Public Utility District No. 1 of Benton County, et al.*, C83-1080 (1983); *In Re Washington Public Power Supply System Securities Litigation*, MDL-551 (1983). These two actions have been consolidated for discovery purposes with a third lawsuit brought by an indemnity company which insured bond purchasers against the risk of loss on their investment in WNP 4 and 5 bonds. *M.G.I.C. Indemnity Corp. v. Public Utility District No. 1 of Benton County, Washington, et al.*, C84-690 (1984). All three of these suits, which are brought against scores of defendants, allege numerous violations of federal and state securities laws as well as common law fraud, negligent misrepresentation, and negligence.[1]

The consolidated federal actions are proceeding expeditiously, with production of literally tens of millions of pages of documents having been completed. Multi-track depositions are presently in progress, with a trial date of March, 1986 scheduled.[2]

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[1]The complaints in these actions consist of approximately 350 pages of allegations against the 88 utility Respondents and other defendants, including: the Washington Public Power Supply System and its Board of Directors; WNP 4 and 5 Participants' Committee members; Blyth Eastman (the Supply System's financial advisor); Merrill Lynch, Salomon Brothers, Smith Barney, and Prudential-Bache (lead underwriters for WNP 4 and 5 bond issues); R. W. Beck (consulting engineer); Ebasco Services and United Engineers & Constructors (architect-engineers); Wood & Dawson and Houghton, Cluck, Coughlin & Riley (Supply System bond and special counsel, respectively); and the Bonneville Power Administration.

[2]In addition to the federal actions, a state court suit brought by bondholders, including American Express Subsidiaries and U.S. Trust Company, against many of the same defendants and others, including the Supply System's auditor, Ernst & Whinney, based upon Washington state securities laws, misrepresentation, negligence, and various equitable theories, is pending in the Superior Court for King County, Seattle, Washington. *Haberman, et al. v. Washington Public Power Supply System, et al.*, No. 84-2-06452-8 (1984). A group of bond purchasers has sued the State of Washington based upon allegations concerning its involvement in WNP 4 and 5. *Hoffer, et al. v. State of Washington, et al.*, No. 84-2-16459-0 (Superior Court for King County, 1984).

Based upon this plethora of lawsuits naming scores of defendants, Petitioners' lament that they and those they represent are totally without possible remedy cannot be taken seriously. To the contrary, the pending federal and state litigation clearly indicates that avenues of relief to WNP 4 and 5 bond purchasers are far from being exhausted.

Faced with an insurmountable obstacle to United States Supreme Court jurisdiction by virtue of the fact that purely local legal issues are involved, and are presently being litigated, Petitioners have attempted, albeit unsuccessfully in Respondents' view, to craft a constitutional argument. Thus, they would have this Court believe that in some way compliance by local municipal corporations with the laws of the state under whose statutes they were formed and are governed creates a federal constitutional issue appropriate for resolution by this Court. Faced with the logical and legal absurdity of that contention, Petitioners take another tack—that of castigating and personally attacking the respected justices of the Supreme Court of the State of Washington who, after twice comprehensively reviewing the issues raised, rendered a decision contrary to Petitioners' position. Petitioners' *ad hominem* attack on the members of the Washington Supreme Court who voted with the majority, mischaracterizing their opinions as manipulations of state law and totally unprincipled rulings, should be viewed by this Court as what it is—the plea of disappointed litigants. Understandable as those pleas may be, they do not form the basis for this Court's certiorari jurisdiction. The fact that a twice disappointed dissenting justice happens to share Petitioners' opinion does not change this inevitable result.

A reasoned decision by the highest court of one of the sovereign States which, as demonstrated below, examined all conceivable possibilities in an attempt to uphold Petitioners' trial court summary judgment, followed by Respondents' compliance with the state Supreme Court's judgment, does not constitute an unconstitutional abridgement of the rights of investors in tax-exempt municipal bonds. As a result, there is

no substantial federal issue within the jurisdiction of this Court.

STATEMENT OF THE CASE

For the first two-thirds of this century, the Pacific Northwest experienced a plentiful supply of electrical power due to the hydroelectric resources of the Columbia River and its tributaries. In the mid-1960's, however, regional energy planners began to foresee an increased need for electrical power that could not be satisfied by then existing resources. The vast majority of the region's public utilities depended wholly upon power purchased from the Bonneville Power Administration. Power forecasting reports from the Bonneville Power Administration and other concerned regional entities agreed that the hydroelectric resources of the Columbia River system, which had for decades provided ample power to the region's residential, farming, commercial and industrial users, would not be able to meet projected increases in power use during the 1980's and beyond. Faced with these projections, the Northwest's public utilities acknowledged their legal responsibility to provide needed electricity to the public and, along with all other major entities concerned with providing sufficient power to the region, began to plan for how to meet the then perceived needs.

Individual public utilities could not by themselves finance the huge costs associated with development of the large plants required by the region. This was particularly true of the development of nuclear plants, which were economically available only in large units that required significant initial capital investment well beyond that associated with earlier hydroelectric plants or coal-fired units. Large scale nuclear plants were being ordered by utilities in every region of the nation in the early 1970's. It was, therefore, determined that the Washington Public Power Supply System, a separate and distinct municipal corporation organized pursuant to the joint operat-

ing agency statutes of the State of Washington, could best serve as the focus for financing and constructing a series of nuclear projects anticipated to meet the projected electrical load growth for the region.

As a consequence, during the early 1970's, the Supply System entered into Net-Billing Agreements with these Respondents and other public utilities and the Bonneville Power Administration, whereby bonds were sold to finance construction of Washington Nuclear Projects 1, 2 and 3. The financing arrangement provided a billing credit from BPA to the participating utilities for amounts they contributed toward construction and other costs. This, in essence, provided a Bonneville Power Administration back-up for amounts necessary to retire the debt for these "net-billed" projects. In 1973, however, a United States Treasury Department ruling denied tax-exempt status for bonds to finance additional thermal projects if the projects were supported by BPA financing in the manner of the net-billed projects. Since regional forecasts projected substantial electrical load growth beyond that which would be provided by WNP 1, 2 and 3, there was a necessity to develop an alternative financing arrangement. What was eventually developed was the Participants' Agreement which is the subject of this litigation.

In early 1973, the Bonneville Power Administration told the utilities and industries that relied upon it for power that it would not be able to meet the energy needs of the region's consumers without construction of additional plants beyond the net-billed plants. To compound matters further, the energy crisis of the mid-1970's hit the Northwest in the same devastating manner it did most areas of the United States. Unlike other regions, the demand for electricity in the Northwest continued to grow after the OPEC oil embargo of 1973-74. Because of the oil embargo and related problems, the Washington legislature enacted legislation requiring public utilities in the State of Washington to develop energy curtailment plans, so that brown-outs or black-outs could be avoided. Penalties were provided for noncompliance with this statutory scheme.

As a result, there was ever-increasing pressure on the region's public utilities to finalize plans for development of needed thermal resources. In the midst of this energy-short climate, the Bonneville Power Administration issued a formal notice of insufficiency on June 24, 1976 stating that as of July 1, 1983, it would no longer be able to guarantee that it could meet the region's needs without the development of additional resources. The region's public utilities already had drafts of the Participants' Agreement for WNP 4 and 5 in their hands. Based upon the perceived need and the BPA notice of insufficiency, just a month later, when the Participants' Agreement was presented for final signature, the region's public utilities entered into what was then known as Phase 2 of the Hydro-Thermal Power Program.

Under the Participants' Agreement, 88 of the region's consumer-owned utilities agreed to assume payment obligations for WNP 4 and 5 by purchasing shares of project capability, irrespective of whether any power was ever produced by the plants. These Respondents believed they had legal authority to enter into such agreements by which they assumed the "dry-hole risk" and have never contended otherwise.

Unfortunately, delays and cost increases resulting from circumstances common to the United States nuclear construction industry occurred. As a result, the amounts needed to finance the projects grew larger and larger and became more and more expensive to raise, despite various financing alternatives explored. In addition, as the 1970's moved into the 1980's, it became clear that electric-load growth had been overestimated throughout the nation. The need for WNP 4 and 5 was many years further away than had previously been anticipated. The temporary result was a construction slowdown or "mothballing" of Projects 4 and 5, a status no different from dozens of other nuclear plants throughout the nation.

To assist the Supply System through the mothballing period, so that the projects' assets could be preserved for the time when construction would recommence and so nuclear licenses

would not be put at risk, these Respondents loaned millions of dollars to the Supply System. Unfortunately, projected costs continued to increase, and the need for the power did not develop. On January 22, 1982, the Supply System terminated construction on WNP 4 and 5.

Under the terms of the Participants' Agreement, payments by participants to the Supply System were not to begin until one year after project termination. To assist the Supply System in preserving the projects' assets for later use or sale and to keep the anticipated costs of terminating the projects in an orderly fashion as low as possible, these Respondents again loaned millions of dollars to the Supply System to assist it in keeping the projects afloat during the one-year hiatus.

Thereafter, in May, 1982, Chemical Bank, the WNP 4 and 5 bond fund trustee, commenced litigation in the Superior Court for King County, Washington, in Seattle, requesting a declaration that the Participants' Agreement was valid and binding and required a mandatory repayment obligation on behalf of the 88 participants. Chemical Bank filed a motion for summary judgment, joined in by the Supply System, by which it asserted that judgment should be rendered as a matter of law, as there were no contested questions of fact. The trial court ruled in Petitioners' favor. Pending the petition for review of that decision, many of these Respondents and other participants raised their electrical rates or otherwise made provision for financing the amounts due under the Participants' Agreement, and placed those funds in a court-approved escrow pending the decision of the Supreme Court of the State of Washington. A direct and expedited review by the Washington Supreme Court was sought so that the appellate process would not be delayed unnecessarily.

In June of 1983, the Washington Supreme Court issued its ruling that the Washington public utility districts and municipalities did not have statutory authority to enter into the Participants' Agreement. Petitioners' motion for reconsideration was denied. Thereafter, as the Supply System was unable

to raise any further funds through bond issues or other alternatives, it was forced to admit in writing its inability to pay its WNP 4 and 5 obligations as they became due. Chemical Bank then immediately declared an event of default and shortly thereafter accelerated the full amount due on the bonds.

In August, 1983, the trial court entered judgment on the basis of the Washington Supreme Court's June, 1983 decision. Chemical Bank and the Supply System then sought review of that Superior Court judgment alleging, among other things, denial of various constitutional provisions. On November 6, 1984, the Supreme Court of Washington issued its opinion rejecting Petitioners' contentions and affirming its earlier rulings. The Washington Supreme Court's mandate was issued on December 17, 1984.

REASONS FOR DENYING THE WRIT

Despite their persistent efforts, the simple truth is that Petitioners have failed to frame any viable federal constitutional issues. This Court has before it two reasoned and principled decisions of the highest court of the State of Washington. The decisions deal, in a comprehensive and orderly fashion, with a dispute involving exclusively principles of Washington state law. Petitioners have come forward with no justification for this Court to become involved in this litigation.

1. Petitioners Have Failed To Meet This Court's Stringent Standards For Review Of The Decisions Of The Highest Court Of A State.

Conspicuously absent from the Petition for Certiorari is any extended discussion whatsoever of this Court's time-honored and common sense reluctance to entangle itself in state court decisions concerning state law matters. This Court's standards for review of alleged constitutional violations differ dramatically when this Court is called upon to review the decision of the highest court of a state, as opposed to a lower federal court. Principles of federalism, comity, and abstention have come together to dictate that this Court show great deference and

give overwhelming weight to the highest court of a state's resolution of both factual and state law issues. For example, it is a fundamental precept that, except in extremely limited circumstances which are discussed *infra*, this Court must accept as conclusive the construction given to a state statute by the highest court of a state. Thus, in *Ex parte Converse*, 137 U.S. 624, 631 (1890), this Court stated as follows:

> It is not our province to inquire whether the conclusion reached and announced by the supreme court was or was not correct, for we are not passing upon its judgment as a court of error . . . . But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

Mr. Justice Cardozo further developed and defined that line of authority in *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 362-65 (1932), when, on behalf of a unanimous Court, he held as follows:

> The inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's.
>
> * * *
>
> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.

Even assuming, *arguendo*, that there was an error of state law by the Washington Supreme Court, this Court has strictly adhered to the view that an error of state law simply does not provide the basis for a legitimate claim of denial of due process or an unconstitutional taking.

> We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has

> been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Gryger v. Burke, 334 U.S. 728, 731, *reh'g denied*, 335 U.S. 837 (1948). Moreover, the Constitution simply does not guarantee that the decision of a state court shall be free from error, or require that decisions of a state court shall be consistent. *Patterson v. Colorado ex rel. Atty. Gen.*, 205 U.S. 454, 461 (1906). *See Stein v. New York*, 346 U.S. 156, 181 (1952); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937); *Roberts v. New York*, 295 U.S. 264, 277-78 (1934); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455-56 (1923).

The only extremely limited circumstance in which this Court has reviewed a state court decision on due process grounds is where the state court determination is totally arbitrary and unprincipled. *See, e.g., Hughes v. Washington*, 389 U.S. 290, 295-98 (1967); *Roberts v. New York*, *supra*, 295 U.S. at 277-78. As demonstrated below, this very narrow exception to the rule that this Court will not sit in judgment of state court determinations of exclusively state law issues is inapplicable to this litigation.

Petitioners have failed to come forward with a "substantial federal question" under this Court's standards for review of the decisions of the highest court of a state. Thus, this Court is without jurisdiction to proceed further in this litigation.

2. Petitioners Cannot Assert In Good Faith That The Decisions Of The Washington Supreme Court Were Unprincipled, Manipulative, and Unjustifiable.

Regardless of whether Petitioners focus upon an alleged unconstitutional taking or a due process violation, the underpinning of their alleged constitutional claim is that the decisions of the Supreme Court of Washington, one of the most highly regarded courts of last resort in the nation, were unprincipled, manipulative, and unjustifiable. It is, however, Peti-

tioners' attack on the Washington Supreme Court that is unjustifiable and unprincipled, not that Court's decision. Petitioners' mischaracterizations of the Washington Supreme Court's decision-making process in this litigation as a cursory rejection of Petitioners' positions are simply untrue. These opinions are not brief, summary rejections of Petitioners' positions. They are thorough and comprehensive evaluations of every conceivable Washington statutory law governing the purchase of thermal project capability by Washington public utility districts and cities. There is simply no credible basis for Petitioners' Takings Clause (U.S. Const. Amend. V, cl. 4) and Due Process Clause (U.S. Const. Amend. XIV, § 1, cl. 3) assertions.

It is fair to assume that, at least in part, Petitioners chose to describe the Washington Supreme Court's decisions in such derogatory terms in an attempt to dramatize this litigation and catch the eye of this Court. There is also, however, an extremely important legal reason why petitioners have attempted to cast those decisions as unprecedented and unforeseeable. As Petitioners themselves have now conceded, a judicial decision cannot provide the stuff of which a Constitutional impairment of contract issue can be raised under Article I, § 10, cl. 1 of the Constitution. Petition at 22. *See, e.g., Tidal Oil v. Flanagan, supra*, 263 U.S. at 451-54. Faced with that reality, Petitioners were forced to base their Petition on the Takings Clause and the Due Process Clause.

Petitioners claim the Washington Supreme Court's decision was so unexpected, unprincipled, and unjustifiable as to be totally arbitrary and thus constitute a taking or a due process violation. Petitioners' own "catch-word" for the Washington Supreme Court's decisions is "unforeseeable." One of the most eloquent refutations of that mischaracterization is provided by Petitioner Chemical Bank's own stance in the proceedings which have taken place in the presently pending federal securities litigation.

At a time when it suited Chemical Bank's purposes to do so—and, more importantly, at a time when Chemical Bank's counsel were under an explicit, affirmative duty pursuant to Rule 11, F.R. Civ. P., to make only those allegations which are "well grounded in fact and . . . warranted by existing law or a good faith argument"—Chemical Bank contended and is at this very moment contending that the decisions of the Washington Supreme Court were anything but "unforeseeable." In Chemical Bank's Second Amended Complaint, which was filed in the federal securities litigation on December 28, 1983, the Bank alleges that some 44 directors of the Supply System, the 88 participants in WNP 4 and 5, the 32 individuals and entities which served on the Participants' Committee, and—most significantly—the Supply System itself (Chemical Bank's co-petitioner before this Court) knew, or were reckless in failing to determine (judged by a scienter standard) as of at least 1976 that the representations in the WNP 4 and 5 official statements concerning the authority of the participants to execute the Participants' Agreement were false. *See* Chemical Bank's Second Amended Complaint at 41-45, 54-55, 57, 62, 68, 72-73, and 76. Those particular allegations, along with others, were the subject of a Rule 11 motion before the United States District Court for the Western District of Washington. After full briefing and oral argument, that Rule 11 motion was denied, thus confirming, at least at this stage of the proceedings, that Chemical Bank and its counsel had a good faith belief in the truth and veracity of their allegations concerning authority.

The import of those allegations, of course, is nothing other than a clear and precise contradiction of the position which Petitioners would now have this Court take. If, as Chemical Bank contends, in or about 1976, well in excess of 150 individuals and entities knew "or should have known" that, if challenged, the Participants' Agreement would one day be declared null and void by the Washington Supreme Court, then how is it in a petition for certiorari filed in February, 1985 those same Washington Supreme Court decisions are suddenly "unprecedented, unforeseeable and unjustifiable"? The answer, of

course, is that Chemical Bank's position before this Court is nothing more than one it has assumed in order to attempt to overcome this Court's stringent standards for the review of a state court decision. Furthermore, contrary to Petitioners' attempt to leave the impression that they are without any judicial avenue of relief, the Bank and bond purchasers continue to pursue massive litigation in the federal and state courts alleging fraud and misrepresentation as a result of the very opinion they argue came as a surprise.

This transparent attempt to substitute words for substance is underscored by the fact that the Supply System, Chemical Bank's co-petitioner before this Court, joined before this Court in the Bank's characterization of the Washington Supreme Court's decisions. How then can it be that in its federal securities action Chemical Bank alleges that the Supply System itself knew or should have known that, if challenged, the Participants' Agreement would fall?[3]

Pleading in the alternative is one thing, and it is a commonly accepted and entirely appropriate legal procedure. However,

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[3]When the bond purchasers' allegations in the federal securities class action are considered, the contrived nature of the present position of Chemical Bank—their bond fund trustee—becomes even more apparent. In the bond purchasers' Second Amended Complaint, they also allege that all participants, all Supply System directors, all Participants' Committee members, and the Supply System knew or should have known prior to July, 1976 that the participants

> lacked the requisite authority to enter into their Participants' Agreement. It is reasonable to infer that at the time the Participants' Agreements were executed these Participants were either aware of serious questions regarding their authority, or recklessly disregarded them because the language of the Agreements, the relevant facts and the law governing their authority did not change adverse to a finding of authority from the time they entered into the agreements through the end of the Class Period.

Second Amended Complaint at § 114. *See id.* at 78-79, 83, 85, 108-112, 113, 115-18. Those allegations leave no room for Petitioners' contention before this Court that the Washington Supreme Court's decisions were completely "unforeseeable."

championing one position in front of this Court in an attempt to characterize a state Supreme Court decision as "unforeseeable" when Petitioner asserts a contrary position before the United States District Court for the Western District of Washington, and purporting to do so in good faith, reveals the inherent weakness in Petitioners' position and the lengths to which they are obviously willing to go in order to persuade this Court to become involved in those decisions. Words cannot hide the lack of a federal question; they cry out for the immediate denial of the Petition for Certiorari.

3. Petitioners Have Not Met Their Burden Of Demonstrating That There Is A Substantial Federal Question Concerning An Alleged Unconstitutional "Taking.

Throughout the Petition for Certiorari, Petitioners have, on a superficial level, made all the proper arguments and invoked all the phrases and concepts which might, in an appropriate case, provide this Court with jurisdiction over a state court decision. When Petitioners' form is discarded and substance is scrutinized, however, it readily becomes apparent that their arguments are groundless. Nowhere is this more true than in Petitioners' arguments concerning an alleged unconstitutional taking.

Petitioners' Takings Clause assertions, in fact, fail at the very outset, as no "taking" occurred. Given the conclusion of the Washington Supreme Court on this precise issue and the deference which this Court has traditionally accorded rulings of this kind by the highest court of a state, this Court need not labor long over Petitioners' takings claims.

In the context of discussing the concepts of restitution and unjust enrichment, the Washington Supreme Court, dealing with an area of the law which is exclusively state-oriented in nature, discussed in detail whether any benefit flowed from the bondholders to Respondents before this Court. In *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 909-11, 691 P.2d 524, 544-45 (1984), the Washington Su-

preme Court definitively determined that Respondents received nothing from the bondholders.

> The definition of benefit is critical to appellants' argument because respondents allege that the bondholders did not confer a benefit on the participants.
>
> * * *
>
> As noted above, the Restatement's definition of benefit is quite broad. Thus, our task here is to determine whether any asserted benefits fall within this definition. We conclude they do not.
>
> We find persuasive respondents' theory that the benefits of the bond revenues flowed to WPPSS and no further. WPPSS contracted with the bondholders, received their money and appropriated it for its purposes. We can see no benefit to the participants in these circumstances.

The issue of whether or not Respondents received anything from the bondholders in any manner or fashion whatsoever was exhaustively briefed and argued before the Washington Supreme Court. Petitioners were given every conceivable opportunity to sway the Washington Supreme Court to their position, but it was soundly rejected by a reasoned and principled holding of that Court.

> It should be added that, however strong the argument for a different interpretation, the one adopted also was strongly supported, so that there can be no pretense that a perverse reading of the law was used as an excuse for [the ruling below by the highest court of a state]. The decision was absolutely entitled to respect.

O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 26 (1916).

Because there was absolutely no *taking* in fact of anything by Respondents, Petitioners' "taking" argument fails at the very threshold stage. Petitioners' nevertheless purport to state a substantial issue under the Federal Constitution because the

Washington State Supreme Court determined that the 28 Washington municipal entities were not able to make restitution because those entities' official acts in connection with the Participants' Agreement were "substantively ultra vires". *Chemical Bank v. WPPSS*, *supra*, 102 Wn.2d at 911-12, 691 P.2d at 544-45.

The Washington Supreme Court's decision on this matter is firmly rooted in well over 80 years of internally consistent Washington Supreme Court decisions. It most recently considered the conditions under which a plaintiff can recover against a governmental entity which acted beyond the scope of its substantive authority in *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982). In that decision, the Washington Supreme Court stated as follows:

> While the ultra vires doctrine prevents a governmental agency from favoring a private entity at the expense of the public interest, it does not leave the unsuspecting private party entirely at the mercy of governmental misfeasance. Under certain conditions, a private party acting in good faith is entitled to some recovery. *First, the agency must have had the power it sought to exercise but merely have exercised it in an irregular manner or by unauthorized procedural means.*[3] *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968). Second, the action must not be malum in se, malum prohibitum, or manifestly against public policy. Finch, at 175; *Edwards v. Renton*, [67 Wn.2d 598, 604 (1965)]. If these two conditions are satisfied, a private party acting in good faith may recover to the extent necessary to prevent "manifest injustice" or unjust enrichment.

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[3]The distinction between procedural irregularity and a substantive lack of authority is justified by the fact that in the latter case, the agency lacks the power to do the act in *any* manner. Where authority is so completely lacking it seems fair to presume bad faith on the part of the private party.

98 Wn.2d at 381, 655 P.2d at 250 (emphasis in text, not footnote, added).

Noel v. Cole, supra, 98 Wn.2d 375, 655 P.2d 245, was only the most recent case in which the Washington Supreme Court set forth the standards which govern the determination of rights, if any, in connection with a Washington municipality's *ultra vires* contracts. Virtually since statehood the Washington Supreme Court has steadfastly maintained that where a municipality lacks *substantive* authority to enter into a contract, the contract is absolutely null and void, and there can be no recovery *on any theory* against the municipality. That concept can come as no "surprise" to petitioners, or to anyone else. *See, e.g., Osborne, Tremper & Co. v. King County*, 76 Wash. 277, 185-86, 136 P. 138, 141 (1913); *State ex rel. Craig v. Newport*, 70 Wash. 286, 292-94, 126 P. 637, 640 (1912); *accord*, 10 E. McQuillin, *The Law of Municipal Corporations* § 29.10 at 2.37 (3d ed. 1981). In *Chehalis County v. Hutcheson*, 21 Wash. 82, 85, 57 P. 341, 342 (1899), the Court (quoting from 2 *Herman on Estoppel* at 1363) offered a concise, yet enduring, summary of the principles underlying the law of Washington State with regard to *ultra vires* contracts of municipalities:

> The true principle in such cases is well settled that one cannot do indirectly, what cannot be done directly, and, where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts.

With this extensive body of *ultra vires* decisions as a backdrop, and after a comprehensive review of the Participants' Agreement and all possible statutory sources of authority for the Washington municipalities' execution of that Agreement, in this litigation the Washington Supreme Court explicitly held that the Washington municipalities lacked *substantive* authority to execute the Participants' Agreement. *Chemical*

Bank v. Washington Public Power Supply System, 99 Wn.2d 772, 798, 666 P.2d 329, 342 (1983). It affirmed this holding in its November, 1984 decision. 102 Wn.2d at 910-11, 691 P.2d at 544-45. This Court has been given no legitimate reason why it should interfere with that ruling on a matter of exclusively state law.

Petitioners also contend that the rulings of the Washington Supreme Court somehow expressly conflict with this Court's determination in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155 (1980). That decision involved a straightforward situation[4] in which a county, acting pursuant to a statute of the state of Florida, took as its own the interest which accrued on an interpleader fund deposited in the registry of the county court. This Court held that because no police power justification had even been offered for the deprivation or taking, and because neither the statute nor respondents in *Webb's* offered any reasonable basis whatsoever in order to sustain the taking of the interest earned by the interpleader fund, an unconstitutional taking had occurred. *Id.* at 163-64. Significantly, this Court went to great pains to emphasize that its ruling in *Webb's* was an extremely limited one.

> We hold that under the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk's fee 'for services rendered' based upon the amount of a principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others—Seminole County's taking unto itself, under [the authority of a specific state statute], the interest earned on the interpleader fund while it was

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[4]The Court expressly recited in its opinion that it had taken jurisdiction of the case "[b]ecause it had been held elsewhere that a county's appropriation of the interest earned on private funds deposited in court in an interpleader action is an unconstitutional taking [citations omitted]." Id. at 159.

> in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments.

Webb's Fabulous Pharmacies, supra, 449 U.S. at 164.

To recite the facts and holding of *Webb's* is sufficient to demonstrate that it has little, if any, relevance to the issues now before this Court. Not only *Webb's*, but also each of the other "takings" decisions of this Court relied upon by Petitioners, deals expressly with situations in which governmental actions were found to involve unconstitutional takings as a result of express legislative or regulatory action. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Armstrong v. United States*, 364 U.S. 40 (1960). No such confiscatory legislative or regulatory activity played any part in the litigation now before this Court. Rather, this Court is faced with a situation in which the Washington State Supreme Court, in two painstakingly detailed and lengthy opinions, determined the limits of the substantive authority of the Washington municipalities. Those decisions are entitled to, and clearly should be accorded, finality and conclusiveness by this Court.

Petitioners further claim that the Washington Supreme Court violated their property rights through an alleged invocation of an unavailable declaratory judgment remedy. *See* Petitioners' Brief at 18. Petitioners make the same assertions in their claims regarding violations of the Due Process Clause. *See* Petitioner's Brief at 26-27.

The underlying basis for Petitioners' claim is the Washington Supreme Court's alleged denial of equitable relief which Petitioners claim was based wholly upon the Court's observation regarding an earlier opportunity to litigate the matters at issue. On the face of the Court's opinion itself, however, it is clear that the Court based its denial of all equitable remedies with regard to Washington municipalities firmly on a totally independent ground: the conclusion that entering into the Par-

ticipants' Agreement on the part of the Washington municipalities was substantively *ultra vires*. The Court explicitly stated that, although its discussion of the procedural versus substantive dichotomy was contained in the section of its opinion concerning restitution or unjust enrichment, its conclusion that the acts complained of were substantively *ultra vires* and, therefore, void in all respects, precluded any equitable relief sought, be it restitution, estoppel, or otherwise. *Chemical Bank v. WPPSS, supra*, 102 Wn.2d at 910, 691 P.2d at 544-45, fn. 10.

The fact that the Court articulated an additional basis for its ruling, even if that basis was erroneous as Petitioners contend, is at best harmless error. In ruling on a Writ of Certiorari, this Court must evaluate Petitioners' claims "without regard to errors or defects which do not affect the substantial rights of the parties", as they are harmless error. 28 U.S.C. § 2111. So long as a proper result is reached pursuant to established legal principles, the fact that an additional allegedly incorrect reason was given is simply not germane. Even if a lower court decision is erroneous, it must be affirmed if the record reveals another ground which supports the decision. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

This "red herring" certainly cannot raise a federal constitutional issue appropriate for review by this Court. The Court's mention of a possible bondholder declaratory judgment action was, in essence, mere *dictum* under the circumstances.[5] Even if the Washington Supreme Court had never alluded to a possible declaratory remedy, there was no basis under Washington law for recovery on any equitable theory against the Washington public utility districts and cities. As a result, Peti-

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[5]Even Justice Utter must have felt this was the case, since, despite his lengthy and vigorous dissent which attempted to articulate his opinion regarding every possible basis for reversal of the majority opinion, he never identified this issue as error appropriate for review by this Court. He apparently recognized that the majority intended this reference only as *dictum*.

tioners' claim that the Washington Supreme Court's mentioning an additional possible basis for its denial of equitable relief creates substantial federal constitutional issues under the Takings Clause and the Due Process Clause should be rejected.

Faced with the insurmountable obstacles to establishing a case based upon the Takings Clause discussed above, Petitioners attempt to fashion a "takings" argument based upon conduct of Washington public utility districts and cities which they totally mischaracterize as "repudiation" of their WNP 4 and 5 obligations. But their only real complaint is with the decision of the Washington Supreme Court. Moreover, as indicated in the Statement of the Case, *supra*, these Respondents never have attempted to "repudiate" their obligation to make payments for WNP 4 and 5. Indeed, all evidence in the record in this litigation and in multiple depositions to date in the federal securities litigation undeniably demonstrates that these Respondents always intended to honor their obligations until the Washington Supreme Court told them they did not have legal statutory authority to do so.

These Respondents always acted under the assumption that they had the "dry-hole" risk for WNP 4 and 5, and they took steps to honor that obligation if necessary. They loaned substantial sums to the Supply System to assist it through the mothball and termination phases, and they raised rates and paid amounts due into escrow pending the Washington Supreme Court's decision.[6] Furthermore, after the Supreme Court's June, 1983 decision, it would have been illegal for Respondents to have made payments pursuant to the Participants' Agreement. Inflammatory and misleading rhetoric can-

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[6]Indeed, in early 1983 these Respondents spent hundreds of thousands of dollars to develop a refinancing plan, which, by means of payments from these Respondents and others, would have enabled WNP 4 and 5 bondholders to be paid one hundred cents on the dollar. This "Debt Reduction Plan," however, did not succeed due to lack of support from the Bonneville Power Administration and the investor-owned utilities.

not transform Petitioners' allegations into a taking or other constitutional impairment of property rights.[7]

4. Petitioners' Due Process Allegations are Unfounded.

Even after having argued their positions to the Washington Supreme Court twice and having engaged in voluminous briefing and oral argument, Petitioners yet continue to assert that they have never had their day in court and that their due process rights have thereby been denied. Petitioners' principal focus concerning procedural due process is on the statutory authority determination by the Washington Supreme Court, including the question of ownership or control by WNP 4 and 5 participating utilities. Examination of the Court's opinions belies Petitioners' assertions that the Court disregarded critical issues and did not provide a constitutionally satisfactory opportunity for Petitioners to be heard. Indeed, in both opinions, the Washington Supreme Court took care to consider every conceivable statutory authority provision which might support Petitioners' position. It examined numerous Washington statutes, including those related to authority to purchase electricity, authority to enter into joint operating agreements, and authority to acquire or construct electric generating facilities, and it reviewed in depth both express and implied statutory powers.[8]

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[7]Various briefs submitted by movants for *amicus curiae* status also address the Takings Clause issue. Those briefs, however, add nothing to Petitioners' argument. Furthermore, the partisan stance taken by the Underwriters and the City of Seattle renders questionable their status as *amicus curiae*. The role of *amicus curiae* is advisory rather than adversary. Although their advocacy stance is understandable as they are defendants in a multi-billion dollar lawsuit as a result of their involvement in WNP 4 and 5, their asserted position as *amicus curiae* may be improper. It is also interesting to note that Petitioner, Chemical Bank, did not name as defendants in its federal court action the Underwriters or any of the other East Coast financial corporations named as defendants by the class plaintiffs.

[8]Indeed, in both Washington Supreme Court decisions, Justice Utter and those who joined him in dissent vigorously asserted their position. Presumably, there was extensive conferencing among the justices with the dissenters unsuccessfully attempting to convince the majority that the latter was in error.

One of Petitioners' own principal examples of the Washington Supreme Court's alleged manipulation of state law, in fact, clearly demonstrates that the Court gave every benefit of the doubt to Petitioners in its consideration of proper statutory authority. Thus, in its discussion of possible authority under statutes relating to the acquisition of electric generating facilities, the Court in its June, 1983 decision at page 785 noted that in its previous decisions construing those statutes, it had "never found authority for a project in which the participants did not have an ownership interest," citing several of its own decisions. The Court, however, went on as follows:

> Nonetheless, *rather than ruling that an ownership interest is an absolute requirement when acquiring or constructing generating facilities*, we will examine the present agreement to determine whether the Participants retained sufficient control over the project to constitute the equivalent of an ownership interest.

Chemical Bank v. WPPSS, *supra*, 99 Wn.2d at 787, 666 P.2d at 337 (emphasis added). The Court incorporated this approach in its second decision as well. *Chemical Bank v. WPPSS*, *supra*, 102 Wn.2d at 892-94, 691 P.2d at 535-36.

Petitioners' assertion throughout their Petition that the Washington Supreme Court denied due process by "ruling for the first time that the authority of the municipalities turned on whether they exercised 'sufficient control' over the management of the projects . . ." is a total mischaracterization of the Court's opinion and Washington law. As demonstrated above, the Court recognized that its precedents required the existence of an ownership interest under the statutes related to acquisition of electrical generating facilities. However, it considered authority underpinnings that went beyond the ownership requirement. It attempted, on behalf of Petitioners, to find that some sort of "control" under the terms of the Participants' Agreement sufficient to constitute the equivalent of ownership under the Washington statutes was present. The Court's finding as a matter of law that no such control existed,

when the Court was by no means required by its earlier decisions to consider anything short of actual ownership, can by no stretch of the imagination constitute a violation of the Due Process or Takings Clauses.

Petitioners also attempt to characterize the Court's decisions as manipulative and violative of the Due Process Clause by asserting that the Court made findings as to the control issue on the basis of a disputed record. But it was Chemical Bank, joined in by the Supply System, which moved for summary judgment in the trial court proceedings. Despite various factual matters Petitioners now assert were present in the trial court record, their motion for summary judgment took the position that the authority issue and all other issues could be resolved as matters of law[9]. Because Petitioners themselves acknowledged that there were no genuine issues of material fact, they can not credibly argue at this point that any decisions, either at the trial or appellate level, were improperly based upon a disputed factual record.

One of Petitioners' principal assertions in this regard is that the Court disregarded the fact that certain participants were also members of the Supply System. Contrary to Petitioners' claims, however, the Court did not purposely overlook the relevance, if any, of the fact that some participants were Supply System members. Petitioners mistakenly assume that the fact that a participant was also a member of the Supply System is in some way relevant to determining whether participants in WNP 4 and 5 retained sufficient ownership control under the terms of the Participants' Agreement to permit a finding of statutory authority. The Court considered that position at least

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[9]This is, of course, consistent with the Washington Supreme Court's conclusion regarding ownership control that "the participants' agreement . . . create[s] the contractual rights of the parties [and] [i]nterpretation of those agreements is a question of law." *Chemical Bank v. WPPSS, et al., supra*, 102 Wn.2d, at 894, 691 P.2d at 536, citing *Kelly v. Aetna Casualty & Surety Co.*, 100 Wn.2d 401, 670 P.2d 267 (1983).

twice[10] and properly rejected it. The Court correctly focused its attention on what elements of control, if any, were provided under the terms of the Participants' Agreement to participants in their role as participants, because it is that role, and that alone, which is relevant to the issue of whether a participant had statutory authority to sign the Participants' Agreement in 1976.

> [W]e do not believe the participants retained sufficient ownership interests or management responsibilities *under this agreement* to constitute acquisition or construction of an electric generating facility.

Chemical Bank v. WPPSS, *supra*, 99 Wn.2d at 791, 666 P.2d at 339 (emphasis added). *See also id.*, 99 Wn.2d at 798-99, 666 P.2d at 342-43. In the second *Chemical Bank* appeal, the Court's painstaking analysis of the Participants' Agreement, addressing its contrast with the rights afforded to one of the investor-owned utilities under its WNP 5 Ownership Agreement with the Supply System, 102 Wn.2d at 892-94, 691 P.2d at 535-36, clearly demonstrates that the Court focused properly upon the terms of the Agreement in evaluating the rights of participants at the time the agreement was signed.

Reduced to basic principles of contract law, the Participants' Agreement involved two contracting parties: the Supply System on one side and participants on the other. The Court properly determined that for the purpose of evaluating statutory authority by virtue of ownership control by a participant who signed the Participants' Agreement in 1976, utilities were not properly viewed as members versus non-members, or as electricity generators versus non-generators, or whatever, but as participants in the projects in question. The Supply System and its member utilities are separate and distinct municipal corporations formed at different times pursuant to Washington law. RCW 43.52.360. Thus, the fact that a participant also might have served in some other role is irrelevant to deciding

[10]The issue of control by virtue of Supply System membership was addressed in both decisions of the Court, as well as in Petitioners' unsuccessful motion for reconsideration after the June, 1983 decision.

whether that participant, as a separate municipal entity contracting with the Supply System for a share of project capability, retained sufficient indicia of ownership under the Participants' Agreement to satisfy the requirements of statutory authority under Washington law.

Furthermore, the Participants' Agreement, and Bond Resolution 890 to which it relates, plainly contemplates that whatever control, if any, might potentially be exercised by the non-Supply System contracting party was to be through the Participants' Committee under the terms of the Agreement. That committee was established under the terms of the Agreement to vote the shares of all 88 participating utilities. In addition, as not all of the Supply System members were participants in WNP 4 and 5, it is clear that the two different capacities were not intended to be viewed as one for the purpose of determining whether in 1976 a contracting party had legal authority to do so. Indeed, some participants did not even become members of the Supply System until after the Participants' Agreement was signed. Since it is a utility's authority at the time the contract was signed which is critical, it is clear that the focus must be on an individual participant's authority as a participant, regardless of any other status or characteristics it might possess.

As to alleged control by virtue of the Participants' Committee, in addition to what has previously been demonstrated in this Brief, suffice it to say that after exhaustive analysis of the terms of the Agreement, the Washington Supreme Court concluded that whatever ostensible indicia of control by participants might have existed under the Agreement were not sufficient to make such control the equivalent of ownership consistent with the Court's previous rulings. The Court properly focused upon the four corners of the Agreement itself and rendered its decision.[11]

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[11]To the extent that Petitioners' excerpts from oral argument and depositions in the MDL-551 federal court action are even supportive of Petitioners' position, which these Respondents contend they are not, the excerpts are not

Finally, Petitioners contend that their due process rights were denied because certain justices declined to disqualify themselves when this case came before the Washington Supreme Court for a second time. Chemical Bank's attack[12] upon these jurists and the deliberative processes of the Court has no merit whatsoever; in addition, the manner in which the Bank chose to raise this issue is woefully deficient and inappropriate as a matter of State law.

Chemical Bank's argument apparently is that if either of the Justices it challenged were customers of one of the municipalities or public utility districts which were found by the Court to be without authority to execute the Participants' Agreement, then those jurists had such a significant financial stake in this litigation that they should not have proceeded to participate in the Court's earlier deliberations.[13] That position is entirely without merit.

The Bank's argument, of course, would mean that no court could ever hear, for example, a case in which an issue of tax law is concerned. If the court hearing such a matter were to strike down the tax in question and thus reduce the tax burden on all affected citizens—including the judge who made the decision—

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germane to the question at issue. The Washington Supreme Court made it clear that its focus (and properly so) was upon the Participants' Agreement itself to determine whether, at the time Respondents signed the Agreement, they retained sufficient management control under its terms to satisfy the equivalent of ownership for the purpose of determining their authority to enter into the Agreement. Opinions of counsel or other parties cannot substitute for the language of the contract which established the parameters of the Participants' Committee's role at the time of the Agreement's execution.

[12]The Supply System did not join in this attack when it was first raised, and it apparently does not endorse Chemical Bank's argument on this point at this stage. See Petition at 27.

[13]It is interesting to note that Chemical Bank has not brought to this Court's attention the fact that Justice Utter, who authored both dissenting opinions, also owns propery served by one of the WNP 4 and 5 participants, despite the fact that the Bank was informed of that fact by the Clerk of the Washington Supreme Court by letter dated January 17, 1984.

the deciding court would indirectly benefit financially from that decision. Nevertheless, the law is replete with decisions in which precisely those types of decisions have been properly rendered by courts. For example, in *Nueces County Drainage & Conservation District No. 2 v. Bevly*, 519 S.W.2d 938, 951-52 (Tex. 1975), the Court held as follows:

> The interest of a judge, in order that he would be disqualified, must, in general, be a direct pecuniary or property interest in the subject matter of the litigation . . . . Where a judge's pecuniary interest is not specially affected, a judge is not by reason of being a taxpayer disqualified from sitting in a case . . . . If it were otherwise, it would be difficult, if not impossible, to get cases tried.

This case fits squarely within the law as pronounced in *Bevly, supra*. *See New Orleans Public Services v. United Gas Pipe Line*, 719 F.2d 733, 735 (5th Cir. 1983) ("Where the utility is a party, the ratepaying status of a judge is not disqualifying."). Unlike the cases relied upon by Chemical Bank, this is not a situation where, for example, any Justice of the Washington Supreme Court '"occupies two practically and seriously inconsistent positions, one partisan and the other judicial . . . ."' *Ward v. Monroeville*, 409 U.S. 57, 60 (1972), quoting from *Tumey v. Ohio*, 273 U.S. 510, 534 (1927).[14]

Chemical Bank's untimely, unfounded accusations of bias should be rejected.

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[14]Even if it were to be assumed for the sake of argument that Chemical Bank's charges were in any way legitimate, however, this Court should carefully note that conspicuously absent from the Petition (as well as from all briefs filed before the Washington Supreme Court) is any memtion, much less any explanation, of why Chemical Bank elected not to level these charges at any of the many times that the Court was considering this case prior to its June 15, 1983 opinion. In addition, Chemical Bank has elected not to bring to the attention of this Court (or to the Washington Supreme Court) the numerous decisions by the Courts of Washington State which have considered and rejected untimely challenges very similar to that in which the Bank is now engaged. *See, e.g., Brauhn v. Brauhn*, 10 Wn.App. 592, 597, 518 P.2d 1089, 1092 (1974).

CONCLUSION

Petitioners and *amici curiae* have attempted to raise every conceivable red flag and catch-phrase, and to enlist every possible means to add authenticity to their assertions of violations of the United States Constitution. No amount of verbiage, however, can change the fact that they have failed to frame any federal constitutional issues which would give rise to this Court's certiorari jurisdiction. For all of the reasons set forth above, the Petition for Certiorari should be denied.

RESPECTFULLY SUBMITTED this ____ day of March, 1985.

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